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IN THE SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1983

5 Civ. No. 6622

mitsue takahashi, *Petitioner*

vs.

GOVERNING BOARD OF THE LIVINGSTON UNION  
SCHOOL DISTRICT; LIVINGSTON UNION SCHOOL  
DISTRICT OF THE COUNTY OF MERCED, STATE  
OF CALIFORNIA; COMMISSION ON PROFESSIONAL  
COMPETENCE; AND DOES I THROUGH V, INCLU-  
SIVE, *Respondents*.

BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE COURT  
OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE FIFTH APPELLATE DISTRICT

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IN THE SUPREME COURT  
OF THE  
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October Term, 1983

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5 Civ. No. 6622

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MITSUE TAKAHASHI, Petitioner

vs.

GOVERNING BOARD OF THE LIVINGSTON  
UNION SCHOOL DISTRICT; LIVINGSTON  
UNION SCHOOL DISTRICT OF THE COUNTY  
OF MERCED, STATE OF CALIFORNIA; COM-  
MISSION ON PROFESSIONAL COMPETENCE;  
AND DOES I THROUGH V, INCLUSIVE,  
Respondents.

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BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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Respondents respectfully pray that a  
writ of certiorari to review the deci-  
sion of the Court of Appeal of the State  
of California in and for the Fifth  
Appellate District entered in the  
above-entitled action on June 20, 1983,

be denied.

#### OPINIONS BELOW

On November 6, 1980, Respondent Commission on Professional Competence of the Livingston Union School District issued its findings of fact and conclusions that Petitioner is incompetent to teach and guilty of two instances of false testimony and ordered the dismissal of Petitioner from her teaching position at the Livingston Union School District.

On June 9, 1981, the Superior Court of the County of Merced, State of California, sustained the findings of fact and conclusions of the Commission On Professional Competence and found Petitioner guilty of unclean hands due to her false testimony at the administrative hearing. (Respondents' Appendix A, pp. 1-11). Thereupon, the

Court entered judgment denying Petitioner's writ of mandate. (Appendix A to Petition, pp. 1-2).

On June 20, 1983, the Court of Appeal of the State of California in and for the Fifth Appellate District affirmed the judgment of the Superior Court of the County of Merced. (Appendix A to Petition, pp. 3-16, and reported at California Teachers Assn. v. Governing Board (1983) 144 Cal.App. 3d 27, \_\_\_ Cal.Rptr. \_\_\_.

On July 14, 1983, the Court of Appeal of the State of California in and for the Fifth Appellate District denied Petitioner's petition for rehearing. (Appendix A to Petition, p. 17).

On August 17, 1983, the California Supreme Court denied Petitioner's request for hearing, R.Bird, C.J. dissenting. (Appendix A to Petition, p. 18).

## JURISDICTION

Jurisdiction of the Court has been invoked by Petitioner under 28 U.S.C. §1257(3). However, Respondents argue that the Court lacks jurisdiction in this case under this statute or any other statute.

## STATUTE INVOLVED

California Education Code §44932(d):

No permanent employee shall be dismissed except for one or more of the following causes:

. . .

(d) Incompetency.

## QUESTIONS PRESENTED

1. Whether the United States Supreme Court lacks jurisdiction in this case.
2. Whether the Court of Appeal gave full consideration to the issues and decided them correctly.

## STATEMENT OF THE CASE

The Petition asks for review of the decision of the Court of Appeal of the State of California sustaining the termination of a public school teacher of the Livingston Union School District. On May 12, 1980, the Governing Board of the Livingston Union School District gave notice to Petitioner of its intent to dismiss her from her position as a permanent teacher because of incompetency (CT 136-140<sup>1/</sup>). See California Education Code Section 44932(d)<sup>2/</sup>. Petitioner requested a hearing pursuant to Section 44943, and a

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<sup>1/</sup> CT 136-140 refers to pages 136-140 of the trial court clerk's transcript, Merced County Superior Court Case No. 65267.

<sup>2/</sup> All statutory references are to the California Education Code unless otherwise indicated.

hearing was held on October 21, 22 and 23, 1980, before the Commission on Professional Competence.

The Commission consisted of one administrative law judge from the State Office of Administrative Hearings, and two appointees who are credentialed to teach and who had served at least five of the previous ten years teaching in the same discipline as Petitioner (Section 44944). The Commission sustained the charges submitted to it and found Petitioner incompetent to teach. In addition, the Commission found Petitioner guilty of two instances of false testimony.

On December 4, 1980, Petitioner sought review of the Commission's decision in the Superior Court of the State of California for the County of Merced. The Court, applying the indepen-

dent review test (Section 44945), sustained the decision of the Commission on Professional Competence. The Court found the factual determinations of the Commission to be correct (CT 85-90). See Respondents' Appendix A, pp. 1-11) The Court also found Petitioner guilty of unclean hands due to her false testimony at the administrative hearing (CT 90).

Petitioner appealed the judgment of the Superior Court to the California Court of Appeal, Fifth Appellate District, on the grounds that:

1. The Court's finding of incompetence was not supported by substantial evidence;
2. The District violated Education Code Section 44660 et. seq. by allegedly failing to adopt measurable uniform goals or

objectives for maintenance of a suitable environment in the classroom.

3. The Court's finding of unclean hands was not supported by substantial evidence.

On June 20, 1983, the Court of Appeal issued a decision affirming the judgment of the Superior Court.

Petitioner petitioned for a hearing before the California Supreme Court, which was denied on August 17, 1983.

#### STATEMENT OF FACTS

Petitioner Mitsue Takahashi was an eighth grade teacher. Over a period of several school years, Petitioner showed an inability to control the pupils in her classroom. The District's dissatisfaction with this lack of discipline in classroom control, an important shortcoming for a teacher of eighth grade



students particularly, was communicated to her frequently and forcefully. Her classrooms were observed, and suggestions for improvement were given over an extended period of time. She was advised to read certain texts and treatises on classroom discipline. She was taken to other classes in other schools to observe teachers who successfully controlled their classrooms. (Tr. 152:12-28) <sup>3/</sup> Throughout this drawn out, patient process of waiting, helping and observing, however, Petitioner not only was unable to improve her perfor-

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<sup>3/</sup> References to the Reporter's Transcript of the dismissal hearing before the Commission on Professional Competence on October 21-23, 1980, are indicated by the symbol Tr. followed by the page number, a colon and the line numbers. The Reporter's Transcript was filed in the Merced County Superior Court for the State of California, Case No. 65267.

mance, but also seemed unwilling or unable to even acknowledge that a serious problem existed.

Therefore, dismissal proceedings were finally brought against Petitioner, based on the observations and evaluations of three separate administrators. Mr. Dale Eastlee was Petitioner's principal and immediate supervisor at Selma Herndon School during the 1977-1978 and 1978-1979 school years (Tr. 32:22-28; 33:1-2). He has a Master's Degree and a General Services Administrative credential, and has also taught grades two through eight. (Tr. 33:5-25)

On several occasions during the 1977-1978 school year, Eastlee observed loud, disruptive, undisciplined and uncontrolled student behavior in Peti-

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tioner's classroom.<sup>4/</sup> Eastlee reported his observations to Petitioner and offered her suggestions for improving classroom discipline.

In her formal evaluation at the end of the 1977-1978 school year (CT 157), Petitioner was again informed of the need to correct her lack of control over the students and of concern with her relations with students and parents. The evaluation stated that Petitioner "either can't, or won't, face the realization that she cannot function as an effective classroom junior high teacher under the circumstances that now

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<sup>4/</sup> The dates and details of the specific instances of student misconduct and classroom disorder, as observed and documented, are presented in the Merced County Superior Court's Findings of Fact and Conclusions of Law. (See Respondents' Appendix A, pp. 1-11.)

exist," and that "if satisfactory improvement is not shown in classroom management and student control, formal dismissal procedures will be initiated during the 1978-1979 school year."

The District, in fact, waited an extra year to begin dismissal proceedings, in the hope that Petitioner would show improvement. Yet Petitioner, as always, simply refused to understand the seriousness of her situation and, in fact, did not seem to realize that something was wrong (Tr. 41:19-22).

Petitioner's problems with classroom management and control continued during the 1978-1979 school year (Tr. 110:16-18). During Dale Eastlee's tenure as principal at Selma Herndon School, the District continually made suggestions to Petitioner for improving her control of the classroom, and in fact provided

a course in classroom discipline and control (Tr. 44:5-24).

Beginning in the 1979-1980 school year, Petitioner's principal at Selma Herndon was Hamilton Brannan (Tr. 104:19-21). Mr. Brannan is extensively qualified as an administrator (Tr. 104-106) and author on educational subjects, including a book on improving discipline in the schools. Mr. Brannan was notified prior to accepting the principalship that Petitioner had received one notice of unsatisfactory performance, but he told the superintendent that he would make his own independent evaluation and judgment (Tr. 106:19-28; 107:1).

During the 1979-1980 school year, Brannan observed numerous instances of uncontrolled, disruptive and destructive student behavior in Petitioner's class-

room as well as Petitioner's inadequate and ineffective teaching methods.

Three separate administrators made independent, objective observations and evaluations and concluded that Petitioner exhibited a serious lack of control over her classroom and other fundamental flaws in her teaching.

At no time during the hearing did Petitioner present evidence tending to establish her competency. In fact, Petitioner's expert witness, Dr. Lester Roth, never did testify that Petitioner was not incompetent (Tr. 260, et seq.).

In attempting to rebut the charges against her, Petitioner testified falsely during the hearing. (CT 89) The Court found that the false testimony constituted unclean hands. CT 90.

#### SUMMARY OF THE ARGUMENT

Review by the United States Supreme

Court is precluded in this case for lack of jurisdiction under 28 U.S.C. §1257(3) or any other statutory provision. No real and substantial federal question, constitutional or otherwise, exists now or has been previously raised on a proper and timely basis in the state courts. The Court of Appeal was presented no federal questions or issues, and its decision rested solely on independent and adequate state grounds involving the interpretation and application of state law under the Education Code. Moreover, Petitioner was denied relief based on her unclean hands.

In addition, the Court of Appeal correctly and fairly found that substantial evidence supported the Superior Court's judgment of Petitioner's incompetency to teach and upheld Petitioner's

dismissal from her teaching position. Affirming that all statutory requirements, including numerous notices and an administrative hearing, were accorded Petitioner, the Court of Appeal properly interpreted and applied state law with respect to the evaluation and dismissal of Petitioner from her teaching position.

Turning on the particular facts of this case and the application of state law regarding teacher dismissals, the issues here are not of interest to the general public nor do they rise to the level of a national concern. Therefore, this case is not sufficiently important to warrant the extraordinary jurisdiction and attention of the United States Supreme Court.

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## ARGUMENT

### I. THE UNITED STATES SUPREME COURT LACKS JURISDICTION IN THIS CASE.

#### A. No Real And Substantial Federal Question Exists In This Case.

Petitioner has invoked jurisdiction of the United States Supreme Court under 28 U.S.C. §1257(3). As applied in this case, this statute allows review by this Court ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

Under 28 U.S.C. §1257(3), the Court's jurisdiction to review the decision of the Court of Appeal of the State of California in and for the Fifth Appellate District in this action as prayed by Petitioner in her Petition

for Writ of Certiorari, is dependent entirely upon the existence of a federal question. St. Louis, I.M. & S.R. Co. v. Taylor (1908) 210 U.S. 281.

The mere presence of a federal question on the face of the petition will not sustain jurisdiction unless the federal question raised by Petitioner is "real" and "substantial." If it appears the question is wholly formal, a matter of conjecture, based upon false assumption, clearly not debatable, or plainly devoid of merit, then the question is considered insubstantial and does not permit review by this Court. Equitable Life Assur. Soc. v. Brown (1902) 187 U.S. 308; Zucht v. King (1922) 260 U.S. 174.

The present case involves no real and substantial federal question, much less the one asserted by Petition-

er. Petitioner asserts the question of whether her dismissal as a public school teacher for failure to "maintain a suitable learning environment" violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This question is merely a matter of conjecture on the part of Petitioner, and not the real question in the case in any sense. The present litigation concerns the substantive and procedural laws of the State of California.

Specifically, this case involves interpretation and application of the Stull Act, Cal. Educ. Code §§44660--44665 (West) [hereinafter cited as Education Code §XXX or §XXX or Stull Act.]. Reliance on the interpretation of state law, pursuant to the Stull Act, in this case as the underlying ground for the decision in both the Superior

Court and the Court of Appeal is clear. (Appendix A to Petition, p. 7-14). In fact, Petitioner admits in her current Petition that the primary question, presented and determined first in the Merced County Superior Court and subsequently in the Court of Appeal of the State of California, Fifth Appellate District, was whether Petitioner's discharge violated the Stull Act under the statutory requirements of §§44660 and 44662. (Petition, p.6).

The California Court of Appeal affirmed the Superior Court's decision that Petitioner's dismissal did not violate the Stull Act since a failure to establish guidelines as required by Education Code §44660 does not affect the District's powers to dismiss Petitioner. (Appendix A to Petition, pp. 7-14).

In addition, the Court of Appeal affirmed the Superior Court's finding that Petitioner's alteration of her testimony before the Commission on Teacher Competence constituted unclean hands. This state procedural issue of unclean hands, in conjunction with the determinative issue of interpretations of the state Stull Act, must be viewed as the "real" and "substantial" question in this matter.

In spite of Petitioner's attempts to frame the determinative issue in this case in constitutional due process dimensions (Petition, p.3), the strategic reliance on the phrase "due process" by Petitioner should be regarded as mere form. Any due process issues involved in this case arise out of state law pursuant to statutory requirements under the Stull Act.

Contrary to the jurisdictional requirements under 28 U.S.C. §1257(3), the question presented in this case is grounded in state substantive and procedural law, not federal law, and by no stretch of reality or imagination, can be considered real or substantial. Therefore, the question does not fall within the jurisdictional purview of this Court.

B. A Federal Question Was Not Properly and Timely Raised In The State Courts

Jurisdiction in the United States Supreme Court is only permitted when the substantial federal question required under 28 U.S.C. §1257(3) has been raised in a proper and timely manner in the state courts. United States Supreme Court Rule 21.1(h) specifically requires that Petitioner "specify the stage in the proceedings,

both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." A thorough examination of the Petition in this case indicates that Petitioner failed to set forth with any specificity and clarity the precise stages of the legal proceedings at which the question of due process under the United States Constitution was raised, the manner in which this particular federal question was raised, or even the way in which the Court of Appeal or any other state court ruled on the question of constitutional due process.

It is a long-established rule that while no particular form of words or phrases is necessary, the jurisdiction

of the United States Supreme Court to review the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately and timely presented in the state system. New York ex rel. Bryant v. Zimmerman (1928) 278 U.S. 63, 67; Prune Yard Shopping Center v. Robins (1980) 447 U.S. 74, 85 n.9. If nothing exists expressly or implicitly in the record that a federal question was presented to the state court, the Court should not take judicial notice that a federal question might have been involved in the case. Yazoo and M.R. Co. v. Adams (1901) 180 U.S. 41. The record filed with the Supreme Court must show that the federal questions were raised properly in the state courts. Live Oak Water Users' Assoc. v. Railroad



Com. of California (1926) 269 U.S.  
354.

The Court on several occasions has ruled that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Bailey v. Anderson (1945) 326 U.S. 203, 206-207; Street v. New York (1969) 394 U.S. 576, 582. The decision and opinion of the California Court of Appeal, the highest state court in this case, is completely devoid of any express or implicit reference to or determination of any federal question under the Due Process Clause. Any use of the phrase "due process" in the Court of Appeal opinion is in no instance linked to the

Federal Constitution or to any cases relying on the Due Process Clause. Rather, the Court of Appeal used the term "due process" only with reference to the procedural statutory safeguards entailed in the Stull Act.

Since the Court of Appeal failed to mention or pass upon any federal question regarding the Due Process Clause, while basing its decision upon the assurance of procedural due process safeguards required under state statutory law (the Stull Act), it should be presumed that the Court's of Appeal omission was due to Petitioner's absence of proper presentation of a constitutional due process question in the state courts.

Petitioner has, in fact, failed to raise or present any federal questions, including the violation of constitu-

tional rights under the Due Process Clause at either the state Superior Court or Court of Appeal level. Although Petitioner did refer to the phrase "due process" on a few occasions in the proceedings in both the Merced County Superior Court and later in the California Court of Appeal, at no time did she cite expressly or rely implicitly on the United States Constitution or any cases based on the Due Process Clause of the United States Constitution. To the contrary, in argument both before the Superior Court and Court of Appeal, Petitioner discussed her deprivation of "due process" in terms of the alleged failure of the District to comply with state law under the Stull Act.

Petitioner relied solely upon the California case of Anderson v. San Mateo Community College District (1978)

87 Cal.App.3d 441, 151 Cal.Rptr. 111. The Anderson case dealt with the question of judicial review in a case involving a college's compliance with its rules and regulations and the California Education Code. The case raised no federal issues and cited no federal authorities including the United States Constitution.

The circumstances in the present case are comparable to those arising in the case of Webb v. Webb (1981) 451 U.S. 493, in which the Court held that it was without jurisdiction where the record disclosed that the petitioner failed to raise her federal claim in the Georgia courts and that the Georgia Supreme Court failed to rule on a federal issue.

In Webb v. Webb, the petitioner used the phrase "full faith and credit" on

several occasions in the state court proceedings, but without citing the Federal Constitution or any cases relying on the Full Faith and Credit Clause of the Federal Constitution. The Court noted that the parties' appellate briefs to the Georgia Supreme Court ignored any federal issue and simply argued the application of state law to the facts of the case. Likewise, the Georgia Supreme Court, believing no federal issue was presented, based its decision on the requirements of Georgia state law.

Further, the Court pointed out that the petitioner had not even claimed the court's failure to reach the federal claim in her petition for rehearing before the Georgia Supreme Court. Hence, the Court declared that it could not conclude on the record presented that

the petitioner had properly and timely raised a federal claim under the Full Faith and Credit Clause of the United States Constitution. Id., at 498.

The Court has consistently refused to consider and determine federal constitutional issues which are asserted for the first time on review of state court decisions. Cardinale v. Louisiana (1969) 394 U.S. 437; Tacon v. Arizona (1973) 410 U.S. 351; University of California Regents v. Bakke (1978) 438 U.S. 265. In the present case, the Court should decline to address the constitutional issue Petitioner has not timely and properly raised in the lower courts.

- C. Since The Court of Appeal Decision In This Case Rested On Independent And Adequate State Grounds, Review By The United States Supreme Court Is Precluded.
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It is well-settled that the Supreme Court of the United States will not review the final judgment of a state's highest court which rests upon adequate and independent state (nonfederal) grounds. Bell v. Maryland (1964) 378 U.S. 226, on remand 236 Md. 356, 204 A.2d 54; Smith v. Smith (1961) 366 U.S. 210; Copperweld Steel Co. v. Industrial Com. of Ohio (1945) 324 U.S. 780. Merely because a state constitution or statute has some similarity to corresponding provisions of federal law does not mean that a federal question is presented since construction of the state provision is strictly a matter to be determined by the state courts. Such a determination is binding on the Court. Miller's Exrs. v. Swann (1893) 150 U.S. 132.

The overriding consideration is that

the decisions of state courts control; state courts speak with final authority on matters of state law. Mullaney v. Wilken (1975) 421 U.S. 684. The Court has itself stated that it is not the function of the United States Supreme Court on reviewing decisions of the state's highest court to construe a state statute contrary to construction given it by the highest court of the state. Landmark Communications, Inc. v. Virginia (1978) 425 U.S. 829.

The decision of the highest state court hearing and ruling on the matters in this case was issued on June 20, 1983, when the California Court of Appeal, Fifth Appellate District, affirmed the judgment of the Merced County Superior Court. (Appendix A to Petition, pp. 3-16) Although subsequently, Petitioner requested a hearing



in the California Supreme Court, the request was denied on August 17, 1983 (Appendix A to Petition, p. 18) and, hence, the judgment of the highest state court considered here is that of the Court of Appeal on June 20, 1983.

The legal issues presented to and determined by the Court of Appeal involved only state law . No federal question was presented to the Court of Appeal and, likewise, the Court of Appeal never considered or made any determination of a federal question in either its holding or opinion.

While the Court of Appeal decision is absolutely devoid of grounds involving a federal question or issue, the state grounds for the Court's decision are firmly expressed in the holding and opinion in the case. The Court identified the single issue presented to it by

**Petitioner:**

Plaintiffs do not contend that incompetency is not a proper course for dismissal of Takahashi. Neither do they urge any procedural deficiency in the contents of the notices of incompetency under the statutory provisions reviewed above. Their sole contention is that the Stull Act evaluation appended to the notice of incompetency given to Takahashi on January 8, 1980, does not satisfy the requirement of Section 44938 that the evaluation be made pursuant to section 44660. Plaintiffs argue the evaluation could not have been required in the absence of guidelines mandated by section 44660. Id. at p. 9.

Petitioner was also denied relief at the state level based on her "unclean hands". See Cal.Jur.3d, Equity, Section 25 at page 460. She was found to have falsely testified in defending her dismissal.

In its conclusion, the Court of Appeal affirmed the trial court's findings that 1) cause for dismissal of

Petitioner for incompetency had been established, 2) notices given to Petitioner by the District complied with the procedural requirements of California Education Code Sections 44938 and 44660, et seq., and 3) Petitioner's false testimony before the Commission on Teacher Competence constituted unclean hands. Clearly, these are independent state substantive and procedural grounds upon which the Court of Appeal based its decision.

II. THE COURT OF APPEAL DECISION  
GAVE FULL CONSIDERATION TO  
THE ISSUES AND DECIDED THEM  
CORRECTLY.

A. Due Process Guarantees of the  
Fourteenth Amendment Were Not  
Denied.

The thrust of the Petition is that Petitioner was not given adequate forewarning of the conduct expected of her. In fact, the notice of problems in

Petitioner's teaching performance and the attempts to help her improve rise quantum levels above what a reasonable person might expect.

Petitioner was terminated from her job with the Livingston Union School District because of incompetency. Cal. Educ. Code §44932(d) (West).

The procedure for terminating a teacher in California follows. The employee may demand a hearing to determine if cause for dismissal exists. A formal adjudicative procedure under the California Administrative Procedure Act (Government Code Sections 11500-11528) governs the dismissal process. Prior to the hearing, full discovery rights including depositions and interrogatories are allowed. The decision is made by a Commission on Professional Competence. The Commission consists of

an Administrative Law Judge of the State of California, an appointee of the school district and an appointee of the teacher involved. The two appointees must both have at least five years of experience in the same discipline as the teacher being terminated, and the five years of experience must have occurred within the previous ten years. Section 44944.

The decision of the Commission on Professional Competence is binding on the governing board of the school district. A terminated teacher may appeal the decision of the Commission on Professional Competence to the Superior Court. The Superior Court will review the record of the hearing and make a decision based upon an independent review of the evidence. Sections 44944, 44945. In the case at bench,

the Petitioner appealed the decision of the Commission to the Superior Court.

Before an employee is dismissed for incompetency, the employee must have been given written notice of the incompetency "specifying the nature thereof with specific instances of behavior and with particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such a charge." Section 44938.

In the case at bench, the findings of fact in the Superior Court clearly show the extent to which Petitioner's rights were protected. (See Respondents' Appendix A, pp, 1-11, attached hereto.) As the findings show, Petitioner was exhibiting deficiencies in controlling student discipline in

January of 1978. Further incidents occurred through May 12, 1980, when notice of termination was given. Problems ranged from failure to stop or attempt to stop the unruly behavior of students, to improper classroom techniques, to failure to respond to vulgar language of her students. On one occasion, students played soccer inside the classroom, screamed loudly and ran in and out of the room for ten minutes without abatement. On May 24, 1979, and again on January 8, 1980, Petitioner was given notices of incompetency specifying specific problems, instances of behavior and giving her an opportunity to correct the problems. These events are detailed in Appendix A, pp. 1-11.

Petitioner's failure to correct the deficiencies, even after specific

notice of deficiencies, and instances of unsatisfactory performance caused her termination. Respondents did not violate due process protections of the Fourteenth Amendment.

B. Petitioner's Argument Is Without Merit In That The Cases Relied Upon By Petitioner Are Distinguishable.

The essential question presented by Petitioner in her Petition queries whether her dismissal from her teaching position for failure to "maintain a suitable learning environment" violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. As argued by Respondents above, the issue as presented by Petitioner incorrectly suggests that the appellate court decision was, and the Court's decision should be based on, a violation of the Due Process Clause.



Petitioner confounds her initial mistake by erroneously arguing that her dismissal for failure to "maintain a suitable learning environment" is unconstitutionally vague, and proceeds to argue at length the existence of a discrepancy between the Court of Appeal decision and legal precedent under the "void-for-vagueness" doctrine. Having initially misidentified the issue in this case, Petitioner now relies upon legal precedent which is distinguishable in law, fact or both from the present case, and, further, fails to acknowledge precedent more appropriate to the real issues in this case.

In support of her argument of unconstitutionality for vagueness, Petitioner cited only three prior cases heard by the Court. Although

each of these cases addresses vagueness under the Due Process Clause, each is readily distinguishable from the present case and not on point.

First, Petitioner cites Connally v. General Construction Company (1927) 269 U.S. 385, as the seminal case on vagueness. Indeed, Connally is well-recognized for a profound statement on vagueness as a violation of due process of law. Connally, however, involved the constitutionality of a statute, and, in particular, a criminal statute providing criminal penalties. Likewise, the cited case of Jordon v. DeGeorge (1951) 341 U.S. 223, involved the constitutionality of a statute identifying the penalties for a "crime of moral turpitude." In the present case, Petitioner does not challenge the constitutionality of the statute per se but rather its interpre-

tation or application by the District under very specific circumstances. In contrast to the cases cited by Petitioner, this is a civil case involving the application of provisions of the California Education Code resulting in no criminal penalties.

This distinction between civil and criminal law is important in that "[T]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." Winters v. New York (1948) 333 U.S. 507, 515. The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct. Williams v. United States (1951) 341 U.S. 97.

In the past, the Court has relied upon a test of reasonableness in apply-

Appeal finally stated ". . . we believe an interpretation of Sections 44660 and 44938 which entirely prevents the district from dismissing incompetent teachers would not be consonant with that court's view of the Stull Act." (Appendix A to Petition, p. 13.)

The Court's of Appeal reliance on Monterey Peninsula to interpret the Stull Act and to determine the relevance of objective evaluation guidelines to teacher dismissal highlights the real issue in this case. Contrary to Petitioner's contentions, the underlying issue is not whether her dismissal was based on unconstitutionally vague standards of incompetency. The real issue here is the interpretation and application of California state law in accordance with legislative intent and compliance with statutory safeguards in

specific cases.

Petitioner goes to great lengths to seek out numerous law review articles and other miscellaneous publications to promote her vagueness argument. These academic articles do not relate to the specific facts in this case. The variety of incidents in Petitioner's classroom involving the lack of discipline, Petitioner's poor evaluations, the numerous attempts by her superiors to assist in her improvement, as well as the documented steps taken to preserve her due process rights according to state law, document the facts, not theory, of the present case.

The decision of the Court of Appeal in this case was both correct and fair. The decision properly interpreted and applied state law in the dismissal of Petitioner and assured compliance with

legislative intent, state practice, and all required constitutional safeguards.

CONCLUSION

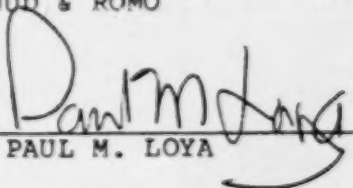
For the foregoing reasons, Respondents respectfully submit that a writ of certiorari should be denied in this case.

Dated: December 14, 1983

Respectfully submitted,

ATKINSON, ANDELSON, LOYA,  
RUUD & ROMO

By

  
PAUL M. LOYA

Attorneys for Respondents

ing the "void for vagueness" doctrine to particular circumstances. In Jordon, 341 U.S. at 231, the Court stated:

We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. United States v. Petrillo, 332 U.S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Connally v. General Construction Co., 269 U.S. 385 (1927).

The Court then proceeded to determine that the test had been satisfied in Jordon because the phrase "crime involving moral turpitude" did not lack sufficiently definite standards to justify the deportation proceeding. Id. at 232. The Court clarified imoli-

the different factual circumstances and the substantial difference in the required level of judicial scrutiny.

Notably, Petitioner cites Connally, Jordon, and Cramp for the principle underlying the vagueness doctrine, but then fails to show in any way whatever how they apply to the present factual circumstances. The Court has clearly stated that due process guarantees vary with factual and institutional contexts. Morrissey v. Brewer (1972) 408 U.S. 471, 481.

Petitioner relies also upon three lower federal court cases. These cases, too, are not on point and provide little support for Petitioner's position. In Burton v. Cascade Union School District (D.Oregon 1973) 353 F.Supp.254, a teacher who was admittedly a practicing homosexual was dismissed from her



position on the basis of "immorality". Under the circumstances of Burton, the statutory term "immorality" was held constitutionally vague.

Petitioner fails to demonstrate how factually or legally the Burton holding relates to the present situation. Here, findings of fact and conclusions by the Commission on Teacher Competence and the Superior Court, later upheld by the Court of Appeal, substantiate in many specific instances how and when Petitioner failed to "maintain a suitable learning environment." This specificity removes any vagueness in the phraseology.

Likewise, Petitioner mistakenly relies on Parducci v. Rutland (M.D. Ala. N.D. 1970) 316 F.Supp. 352 and Dean v. Timpson Independent School District (E.D. Texas 1979) 486 F.Supp. 302. Both

are academic freedom cases involving choice of teaching method and First Amendment rights. These cases are not applicable to the present case since, as noted previously, cases concerned with fundamental rights require a different standard of judicial scrutiny than cases, such as this, involving no fundamental rights.

Another important distinction between Parducci and Dean and the present case is the degree to which standards are provided. Parducci involved a total absence of standards since no school policy existed for the selection and assignment of outside materials. The Parducci holding was expressly limited to the special circumstances of the case. Parducci, 316 F.Supp. at 357.

Similarly, in Dean, no duly promul-

gated policy regarding use of an ethnic survey existed. To the contrary, in the present case, school board policies delineated the teachers' responsibilities in maintaining a suitable learning environment.

Better authority lies in the cases of Blunt v. Marion County School Board (C.A. 5 Fla. 1975) 515 F.2d 951 and Gwathmey v. Atkinson (E.C. Va. 1976) 447 F.Supp. 1113. In Blunt, the court upheld the dismissal of a teacher of 25 years where she utilized group teaching techniques inefficiently, exhibited instructional deficiencies, failed to keep proper records and grade students' work, and exhibited hostility to superiors when they offered assistance. The Court held that due process was satisfied in that substantial evidence supported the school board's

finding that the teacher was incompetent.

Likewise, in Gwathmey, a teacher's dismissal withstood constitutional attack. The Court held that evidence supported the school board's finding of incompetence where the plaintiff had not been directly teaching students or following suggestions of his superiors. Similarly, in the present case, first the Commission on Teacher Competence, then the Merced County Superior Court and subsequently, the California Court of Appeal confirmed that sufficient evidence existed to justify Petitioner's dismissal for incompetence.

Petitioner relies heavily on case authority from California and other states' courts. Although the Court is not bound by state case authority, it is noteworthy that the facts in each of

Petitioner's cited cases vary considerably from the present situation. When Petitioner offered some of these same cases in her Court of Appeal argument, the Court of Appeal rejected any basis for comparability between cases involving other causes for dismissal and the present case:

The danger in such situations (where the offense purporting to justify dismissal involves questions of moral turpitude or unfitness to teach) that a lack of objective standards will vest unbridled discretion in the districts and trial courts, is not present where incompetence is alleged and, as in this case, supported by allegations of specific conduct. Appendix A to Petition, p. 14.

The key case which Petitioner should have, but failed to address, is Certificated Employees Council v. Monterey Peninsula Unified School Dist. (1974) 42 Cal.App.3d 328, 116 Cal.Rptr. 819, which the Court of

Appeal considered singlely important in the present case as the "one judicial expression of statutory interpretation relevant to the Education Code sections at issue." (Appendix A to Petition, p. 12.) The Court of Appeal acknowledged the following significant point in the Monterey Peninsula case:

Stull does not require that school districts use the guidelines for determining tenure nor does it require any other consequences. While many school districts will undoubtedly utilize the evaluations and assessment guidelines in making determinations of tenure, in and of itself this fact does not make them tenure regulations. Monterey Peninsula, 42 Cal.App.3d at 336.

The Court of Appeal interpreted Monterey Peninsula to mean that the District's failure to create guidelines pursuant to Education Code Section 44660 had no effect on the District's powers of teacher dismissal. The Court of

cations of the decision in other more difficult cases by stating that ". . . doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness." Id.

Accordingly, the Court has on many occasions ruled that statutory language under attack survives under the vagueness doctrine: "political purposes," United States v. Wurzbach (1930) 280 U.S. 396; "reasonable variations shall be permitted," United States v. Shreveport Grain & Elevator Co. (1932) 287 U.S. 77; "any offensive, derisive or annoying word," Chaplinsky v. New Hampshire (1942) 315 U.S. 568.

More recently, in the case of Rose v. Locke (1975) 423 U.S. 48, the Court clarified certain limitations on application of the vagueness doctrine.

. . . [t]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." Robinson v. United States, 324 U.S. 282 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. . . All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden. Id., at 49.

The third and final United States Supreme Court case cited by Petitioner is Cramp v. Board of Public Instruction of Orange County (1961) 368 U.S. 278. Although Cramp involves the dismissal of a public school teacher, it is not on point. Cramp dealt with the constitutionality of a loyalty oath statute applied to public school teach-



ers. This case involves application of California teacher evaluation statutes in the dismissal of a public school teacher. While Cramp concerned fundamental First Amendment rights, this case involves no such fundamental constitutional rights.

A stricter standard of judicial scrutiny is required in First Amendment and other fundamental rights cases. Smith v. Goquen (1974) 415 U.S. 566, 572-573. In Cramp, 368 U.S. at 287, the Court declared:

The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution . . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.

Consequently, Petitioner's reliance on Cramp is seriously misplaced in view of

to shut up." Petitioner apologized but otherwise ignored the screams, and turned to the filmstrip projector to start the lesson. The screaming continued for some time until the student saw the principal in the doorway.

18. On November 27, 1979, petitioner's class was in a disorganized and uncontrolled state. Some groups of students were working, others were talking, three boys were wrestling over a roll of masking tape until told to stop. Petitioner did not respond to the noise or movement but walked around talking to individual students. According to the lesson plans, the class should have been involved in a whole group activity.

19. On January 25, 1980, petitioner exhibited inadequate methods and techniques of teaching. The task analysis

for permutation problems in math was prepared but not followed. There was no anticipatory set to establish the purpose and focus of the lesson. There was no opportunity for students to restate what they had learned.

20. On March 20, 1980, from 9:45 to 10:04 a.m., petitioners's eighth grade class diagrammed sentences and later changed to math. Students shouted out answers or requests for help even though petitioner asked them to raise their hands. To get students' attention, she shouted over their voices, but this made little difference in the students's attention.

21. On April 15, 1980, questions posed by petitioner on square roots were formulated in such an unclear manner that they prompted loud and confusing total group responses. Petitioner did

not manage the classroom environment adequately to provide for effective teaching and active learning. Students were allowed to behave in a disorderly manner (loud talking, laughter, jokes, mimicking) without any consequences or demands from petitioner that they stop this behavior.

22. On April 22, 1980, a parent requested that her child be transferred from petitioner's class, on the grounds that there was no discipline in her classroom, nobody understood the assignments she gave, and the students who want to study are unable to do so because of the disorder.

23. On May 8, 1978, and on numerous subsequent occasions, petitioner was informed of the need to correct her lack of control over the students and of concern with her relations with students

and parents.

24. Petitioner's testimony that the events described in paragraph 18 occurred during a break between classes, and that the observation described in paragraph 21 was altered after it had been shown to her was false and not entitled to credit.

25. Throughout the time periods in issue here, petitioner was given the opportunity to respond in writing to the various charges against her, but never did so respond within the allotted time periods.

From the foregoing facts, the court concludes:

#### Conclusions of Law

1. In the aggregate, the events and facts described above constitute cause for the dismissal of petitioner from her position as a permanent certificated

employee of the District under Section 44932(d) of the Education Code.

2. Each of the notices described in finding 3 complied with the procedural requirements of Section 44938 of the Education Code. The evaluations attached to those notices complied with Section 44660, et seq. of the Education Code.

3. The facts described in finding 24 constitute unclean hands by the petitioner.

Dated: June 9, 1981

DONALD R. FRETZ  
Judge of the Superior Court

# CERTIFICATE OF SERVICE

I hereby certify that photostatic copies of the Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Fifth Appellate District for Respondents in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 14th day of December, 1983, to:

Clerk of the Supreme Court  
Supreme Court of the United States  
One First Street, N.E.  
Washington, D.C. 20543  
(original plus 40 copies)

Mary Louise Frampton  
Frampton, Karshmer & Kesselman  
925 N. Street, Suite 150  
Fresno, California 93721-2256  
(one copy)

I declare under penalty of perjury that the foregoing is true and correct.

A P P E N D I X    A

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

CTA; MITSUE TAKAHASHI,  
  
Petitioners,

v.

No. 65267

LIVINGSTON UNION SCHOOL  
DISTRICT, et al.,

Respondents.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Findings of Fact

1. Harold H. Thompson made the accusation in his official capacity of Superintendent of the Livingston Union School District.

2. At all times material herein,



petitioner was employed as a permanent certificated employee of the District.

3. Two separate notices of incompetency were personally served on petitioner on April 24, 1979 and January 8, 1980, respectively. Each of the notices specified the nature of the incompetency and gave specific instances of behavior with such particularity as to furnish to petitioner an opportunity to correct her fault and to overcome the grounds for the charge of incompetency. Each of the notices included an evaluation made pursuant to Article 11, commencing with Section 44660, of Chapter 3 of Part 25 of the Education Code.

4. On May 12, 1980, the Superintendent filed a statement of charges against petitioner with the Governing Board of the District.

5. On May 12, 1980, the Governing Board of the District resolved to give notice of intention to dismiss to petitioner.

6. On May 12, 1980, petitioner was personally served with the notice of intention, a statement of charges, and a copy of the applicable provisions of the Education Code.

7. On June 9, 1980, petitioner requested a hearing.

8. On January 9, 1978, in petitioner's classroom between 1:00 and 1:45 p.m., petitioner failed to exercise classroom and student control as alleged in paragraph 1 of the statement of charges.

9. On October 16, 1978, at 2:45 p.m., students were playing soccer inside petitioner's classroom, screaming loudly, and running in and out of the

room. This activity continued for approximately ten minutes.

10. On November 3, 1978, at 1:05 p.m., students were yelling in class and were disturbing office personnel by yelling over the intercom.

11. On November 17, 1978, at 10:00 a.m., students were observed standing at the backdoor of petitioner's classroom yelling to students on the playground.

12. On May 16, 1979, from 1:00 to 1:15 p.m., in and near petitioner's classroom, three boys were wrestling and yelling outside the backdoor. Students were wandering around the room, visiting and yelling. One boy threw a pencil across the room to a friend, telling him to sharpen it for him. One girl was reading a magazine and told petitioner "she didn't feel like doing work that day." She continued to read the maga-

zine. One girl sat outside for the duration of the period, stating simply that she did not want to go to class.

13. On June 8 , 1979, Joe Holt, a maintenance man, overheard vulgar language by various students in petitioner's class and in her presence. These conversations were lengthy and loud enough for Holt to hear while working under the sink, and caused Holt to stand up to see if petitioner was still in the room.

14. On September 26, 1979, in petitioner's classroom, several conversations not related to the lesson were going on between students while she tried to conduct the lesson. She often asked questions and immediately answered them herself, thus not giving students a chance to answer. The petitioner failed to realize which issues students had

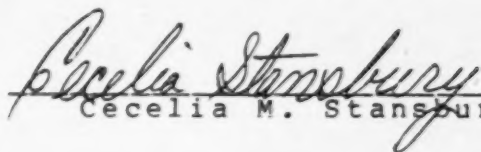
strong feelings about, and thus missed great opportunities for discussion. Class time and material were used with no demonstrated objective, learning or evaluation.

15. On October 24, 1979, petitioner's class was observed from 10:45 to 11:17 a.m. There was no planning of lessons, and no learning objective or focus for the lesson. Her plan book showed few lessons actually planned in advance and clearly determining the objective.

16. On October 23, 1979, a student was transferred to another room so she could resume learning. This student was unable to work effectively in petitioner's classroom because of noise and confusion in the class.

17. On November 14, 1979, a girl student was screaming at petitioner, "you don't have to poke me, just tell me

Executed on December 14, 1983,  
at Pleasanton, California.

  
Cecelia M. Stansbury